Supreme Court U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

GABRIEL RUBINSTEIN,

Petitioner,

vs.

RAMAPO COLLEGE OF NEW JERSEY, EDWARD SAIFF, ROBERT A. SCOTT, JAMES KELLETT, ROBERT HATALA, and EDWARD CODY,

Respondents.

On Petition for a Writ of Certiorari to the New Jersey Superior Court, Appellate Division

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether, under doctrine of federal *res judicata*, transactionally independent federal theories under 28 U.S.C. § 1983, asserted but unadjucated in a federal court's multiple-claim action, dismissing all pendent state law theories without prejudice, precludes its reassertion in a subsequent state court action.

(2) Whether the simple dismissal of a federal complaint upon the dismissal of all pendent state theories without prejudice is also, generally, without prejudice as to any asserted but unadjudicated federal or state theory.

(3) Should the evolving cause of action test under *res judicata* be generally equated with the transaction test based on a separate and independent factual grouping.

(4) Is the case or controversy under 28 U.S.C. § 1367(a), equated with the common nucleus of operative facts criterion, to be generally equated with the transaction test or with a looser factual nexus as applied by some federal courts.

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The petitioner, Gabriel Rubinstein, respectfully petitions the Honorable Court to issue a Writ of Certiorari to review the April 23, 1997 Order of the Supreme Court of New Jersey, from which reconsideration was denied on June 30, 1997. The Supreme Court refused to review the November 20, 1996 opinion of the New Jersey Superior Court, Appellate Division.

OPINIONS BELOW

The opinion of the New Jersey Superior Court, Appellate Division is unreported. The Opinion of the Superior Court of New Jersey, Appellate Division was not published.

STATEMENT OF JURISDICTION

On November 20, 1996, the New Jersey Superior Court, Appellate Division upheld the dismissal of the petitioner's complaint. The Supreme Court of New Jersey denied a Petition for Certification on April 24, 1997. A timely Petition for Reconsideration was denied by the New Jersey Supreme Court on June 30,1997, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1367, Supplemental Jurisdiction provides in part:

> (a) [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the

> United States Constitution []. (c) The district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if — (3) the district court has dismissed all claims over which it has original jurisdiction. [] (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled for a period of 30 days after it is dismissed .

STATEMENT OF THE CASE

This case began on January 6, 1992 when petitioner, Dr. Gabriel Rubinstein, filed a complaint in United States District Court for the District of New Jersey.

In the District Court case petitioner complained that respondents interfered with his property and liberty interests, without due process, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988. Petitioner complained that respondents retaliated against him for conduct protected by the First and Fourteenth Amendments of the United States Constitution. In addition to the federal claims in the District Court action, petitioner complained of state law violations of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* He complained that Ramapo College breached his employment contract. He complained that respondents inflicted severe emotional distress upon him, tortiously interfered with this prospective economic advantage and his contract rights, and committed fraud and misrepresentation against him.

On August 18, 1992, the Honorable Alfred J. Lechner, Jr.,

Judge of the United States District Court, issued a letter opinion dismissing the case. Because the addressed federal claims were dismissed and only state law claims remained, Judge Lechner declined to exercise jurisdiction and did not decide these claims. Petitioner did not appeal the District Court decision.

On September 17, 1992, within the thirty days saving clause pursuant to 28 U.S.C. § 1367(d), petitioner filed a Complaint in the New Jersey Superior Court, Law Division. He amended the Complaint on January 4, 1993. All the counts in this Amended Complaint were dismissed by the Honorable James T. Murphy, who ruled on three motions by respondents. Petitioner raised federal questions in the state court proceedings, as required under Rule 14(1)(g)(i) of the Rules of the Supreme Court.

Motion 1. Respondents brought a Motion to Dismiss, which was heard by the Judge James T. Murphy, on June 9, 1994. The resulting order dismissed the following claims with prejudice: all claims for personal injuries, claims for intentional infliction of emotional distress, all federal claims based on the United States Constitution and/or 42 U.S.C. § 1983, or otherwise, claims based on New Jersey Law Against Discrimination, claims based on denial of requests for leave of absence, and claims for tortious interference with contractual rights or prospective economic advantage or breach of contract. The court found that only "that aspect of the motion to dismiss claims sounding in slander, misrepresentation or fraud is denied." Judge Murphy attached slander to misrepresentation and fraud.

On June 20, 1994, petitioner brought a Motion for Reconsideration. The motion was denied.

Motion 2. Respondents brought a Motion for Summary Judgment regarding the allegations of slander, misrepresentation and fraud. On February 9, 1995, a second order was entered by

Judge Murphy dismissing all claims of misrepresentation and fraud against all respondents, but denying that aspect of the motion as to respondent James Kellett and his employer Ramapo College as *respondeat superior* on the issue of slander.

Motion 3. Respondents brought a second Motion for Summary Judgment for claims against respondent James Kellett for defamation and as to Ramapo College for *respondeat superior* as it relates to allegations of defamation by James Kellett. On May 5, 1995, a third Order was entered by the Honorable James T. Murphy granting respondents' motion for summary judgment to dismiss claims for defamation and *respondeat superior.* The judge considered that all other aspects of the motion were moot.

The Honorable Patrick F.X. Fitzpatrick dismissed the case on procedural grounds without prejudice on May 1, June 5 and August 2, 1995 and with prejudice on May 2, 1995. This Order was vacated on June 9, 1995, restoring the case to trial call.

On May 15, 1995, petitioner brought a motion for reconsideration to vacate the Orders of February 9 and May 5, 1995. On July 7, 1995 petitioner sought leave to amend his amended complaint as to a handicap discrimination claim. The motions were denied on July 14, 1995.

Petitioner filed his Notice of Appeal to the Superior Court, Appellate Division, on August 28, 1995.

On October 30, 1995, petitioner brought a motion to settle the record. The Court determined that petitioner's motion for reconsideration was filed on May 15, 1995.

The Appellate Division ruled on November 20, 1996. Notice of Petition for Certification was filed on December 5, 1996 with

the Supreme Court of New Jersey. The Petition was denied on April 24, 1997. A motion for reconsideration was denied on June 30, 1997.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER'S MERITORIOUS CLAIMS UNDER 28 U.S.C. § 1983 ARE NOT PRECLUDED BY DOCTRINE OF *RES JUDICATA*.

Petitioner respectfully submits that his claims under § 1983 were plainly and properly before the state courts, and they should not have been precluded by *res judicata* since: (1) there was no final judgment on the merits on these legal theories asserted in the prior federal action; and that (2) that they were based on a different claim or transaction from that adjudicated by the district court in this multiple-claim action.

A. The Claims.

The federal action consisted of two claims or transactions, each constituting of two § 1983 theories, — the "harassment" and "suspension" claims. The facts alleged related to these two claims as well as to the state theories some of which were transactionally related to one, others to the other, and some to both.

The harassment claims was based on respondents' acknowledged wrongful action in January 1986 secretly libeling petitioner as to sexual harassment in retaliation to his having exercised his right since October 1985 to speak freely of matters of public concern. The defamation deprived petitioner of his liberty in reputation without due process and in violation of the

First and Fourteenth Amendments of the Constitution. *See Paul v. Davis,* 424 U.S. 693, 711 n.5 (1976); *Marrero v. City of Hialeah,* 625 F.2d 499, 514 (5th Cir. 1980).

The suspension claim was based on tenured petitioner's having been suspended from teaching in January 1990 without any notice, hearings, pay, or probable cause in retaliation to his ongoing seeking redress since December 1989 of his previously filed grievances with the College's Affirmative Action Office's written policy and procedures alleging, *inter alia,* defamatory handicap discrimination. The defamatory suspension and the filed grievances were based on acknowledgely false allegations that petitioner was mentally irrational and unstable depriving him of his property and liberty without due process violating his rights under the Fourteenth Amendment as well as his First Amendment right to seek redress of his legitimate grievances which were summarily denied a day after the suspension. *See Paul, supra; Gross v. Lopez,* 419 U.S. 565 (1975); *Barry v. Barchi,* 433 U.S. 55 (1979); *Morton v. Beyer,* 822 F.2d 364 (3rd Cir. 1987); *Bradley v. Pittsburgh Board of Education,* 913 F.2d 1064, 1077-8 (3rd Cir. 1990); *Ersek v. Township of Springfield,* 102 F.3d 85, 89 n.5 (3rd Cir. 1996); *Capua v. City of Plainfield,* 643 F. Supp. 1507 (D.N.J. 1986); *San Filippo v. Bongiovani,* 30 F.3d 424 (3rd Cir. 1994).

II.

APPLICATION OF RES JUDICATA IN THE CONTEXT OF THIS MULTIPLE CLAIM ACTION AND SUPPLEMENTAL JURISDICTION

Federal law determines the effects under rules of *res judicata* or claim preclusion of a judgment of a federal court. *Heck v. Humphrey,* 129 L. Ed. 2d 383, 295 n.9 (1994); *Restatement, (2d) of Judgments* 87; *Watkins v. Resorts Intern.*

Hotel & Casino, 591 A.2d 592 (N.J. Sup. Ct. 1991). Under *res judicata,* a final judgment on the merits of the action preclude the parties or their privites from litigating issues that were or could have been raised in that action on the same cause of action. *Federated Department Stores Inc. v. Moitie,* 452 U.S. 394, 398 (1981). "[W]here the second action between the parties is upon a different cause of action or demand [] prior action operates as an estoppel not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted upon the determination of which the finding [] was rendered." *Commissioner of Internal Revenue Service v. Sunnen,* 333 U.S. 591, 597-8 (1948), *quoting Cromwell v. Sac County,* 94 U.S. 351, 353 (1877).

Under the *Restatement, supra,* § 24, Illustration 8 (employer-employee) a claim is defined by the relevant factual grouping which constitute a transaction or a series of transactions. *Restatement, supra,* § 24(1)(2), Illustration F (debtor-creditor); Illustration 8 (employer-employee); *id.* comment a at 197, comment b at 199. A claim may be based on a single act or a series of nearly simultaneous acts or events which are substantially of the same sort forming a separable and convenient trial unit seeking a remedy for a single harm, injury or wrong. *Id.* comment d at 201; *Watkins, supra,* at 413; *cf. Gregory v. Chehi,* 843 F.2d 111, 116-7 (3rd Cir. 1988).

In the context of pendent or supplemental jurisdiction, a claim is defined by a case or controversy where the federal and state law theories drive from a common nucleus of operative facts. 28 U.S.C. § 1367(a); *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966); *Restatement, supra,* comment b at 199; *id.* 87, Reporter Note at 319; *New Rock Partners, L.P. v. Preferred Entity Advanc.,* 101 F.3d 1492, 1105 (3rd Cir. 1996); *Sinclair v. Coniform,* 935 F.2d 599, 603 (3rd Cir. 1991).

An ongoing dispute, whether based on the same or different legal theory or statute, may give rise to separate claims or transactions which can be litigated in separate actions. *See Sunnen, supra* (taxes); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1954) (antitrust); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978) (negligence); Restatement, *supra*, § 24, Illustration 8 (employer-employee); *Lyon v. Whisman*, 45 F.3d 758 (3rd Cir. 1995) (same); *Allied Signal Inc.*, 985 F.2d 908, 913-5 (7th Cir. 19930 (same); *United States v. Athlone Industries Inc.*, 746 F.2d 977 (3rd Cir. 1984) (debtor-creditor); *Bockweq v. Anderson*, 428 S.E. 2d 157 (N. C. 1993) (doctor-patient). *State v. Santomauro*, 618 A. 2d 917 (N.J. App. Div. 1993) (permits sale of deer).

"[If] the relevant facts in the two cases are separable, even though they are similar or identical, collateral estoppel does not govern the legal issues which recur in the second case." *Sunnen, supra* at 601. "So long as one claim requires proof of different acts than another, multiple claims are involved." 21 *Federal Procedure, Judgments and Orders*, § 51:74 at 505 (Fed. R. Civ. Proc. 54(b)). "Events that are related in origin and nature may nonetheless involve such clear separations and discontinuities as to create separate causes of action without room for dispute." *Wright, Miller, & Cooper, Federal Practice*, § 4409 at 73 (1996 Supp.); *id.* at 73-88 (citing cases).

The federal action consisted of two claims or transactions, each constituting of two § 1983 theories, — the "harassment" and "suspension" claims. The conduct giving rise to the two claims, even though both based on § 1983, occurred at different times and involved different types of acts by different officials; the relevant operative facts are clearly separable requiring different proofs. Had petitioner instituted an action when the first claim matured, the second claim could not have been asserted since it had not yet arisen.

The district court only addressed the § 1983-harassment theories dismissing them because petitioner was not terminated. Thereupon, the court dismissed all the state theories transactionally related to both harassment and the suspension claims without prejudice. None of the § 1983-suspension theories and related issues were actually litigated or decided by the court.

A final judgment on the merits is a necessary requisite for claim or issue preclusion. *Marks v. Stinson,* 19 F.3D 873, 885 n.10 (citations omitted). Since the instant 1983-suspension theories were asserted in the prior federal action but were not explicitly, implicitly, or finally disposed of on their substantive merits or otherwise, they are not barred in the subsequent state action. *See Moitie, supra; Sunnen, supra* at 597-8. *See also Central R.R. Co. v. Neeld,* 139 A.2d 110 (N.J. Sup. Ct. 1958), *cert. denied,* 357 U.S. 928 (1958); *Longo v. Reily,* 114 A.2d 302 (N.J. App. Div. 1955), *certif. denied,* 134 A.2d 540 (1957); *Donnelly v. United Fruit Co.,* 183 A.2d 415 (N.J. App. Div. 1962), *aff'd,* 190 A.2d 825 (N.J. Sup. Ct.1963); *MacFadden v. MacFadden,* 134 A.2d 531 (N.J. App. Div. 1958); *Mason v. Nabisco Brands Inc.,* 558 A.2d 851 (N.J. App. Div. 1988); *Wade v. City of Pittsburgh,* 765 F.2d 405, 411 (3rd Cir. 1985).

When a district court relinquishes jurisdiction over pendent state theories, the entire complaint is dismissed without prejudice, as the district court has done. (Aa 277). *See Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350 and n.7 (1988); *id.* at 354 ("pendent claims are not separate and independent within the meaning of the removal statute."); *LaBuhn v. Bulkmatic Transport Co.,* 865 F.2d 119, 121 (7th Cir. 1988). Thus, by relinquishing supplementary jurisdiction, the district court, could, and did, not dismiss the suit with prejudice depriving is order of any *res judicata* effect as to asserted but unadjudicated legal theories whether the action consisted of one or multiple claims.

Since the instant 1983-suspension theories asserted in the federal action were not dismissed on their merits, the court's order was interlocutory resulting in a simple dismissal; the order was non-appealable. 28 U.S.C. § 1291, § 1292. Petitioner neither attempted an appeal of the decided (1983 harassment theories nor have they been reasserted in the state action. The theories, while viable, *see Paul, supra,* would have likely to have been subsequently barred by the two-years statute of limitations. Instead, petitioner voluntarily dismissed the instant (1983 theories within 30 days of the dismissal of the state theories and reasserted them in the state action. *See* 28 U.S.C. § 1367(d) within 30 days of the dismissal of all the pendent state theories, and reasserted them all in the state action. *See* 28 U.S.C. § 1367(d) (voluntary dismissal of "any other [claim"); Fed. R. Civ. Proc. 41(a)(1); *Restatement, supra,* 20(1)(b)(b). As such, they are not barred by *res judicata.* Section 1367 contemplates that a case can be, in effect, "remanded" by the court and petitioner to state court, including any remaining federal theories, without prejudice or any *res judicata* effects.

Had the district court retained the instant 1983-suspension theories, it would have to dismiss those state theories sharing a common nucleus of operative facts with the dismissed § 1983 harassment theories, *e.g.*, gender discrimination under New Jersey Law Against Discrimination and related fraud, forcing multiple litigations. *Cf. Lyon, supra,* at 762-3 (discussing the conflict in the federal courts as to the required nexus). Since the federal courts are of such limited jurisdiction, and since both they and state court have concurrent jurisdiction over § 1983 claims, the state action was but a logical continuation of the federal action — without resorting to unnecessary appeals by the petitioner. Further, the material facts and evidence used in the state court proceedings were the same as those needed to adjudicate the instant § 1983 theories causing no undue inconvenience to respondents.

Significantly, respondents did not attempt an appeal, *see LaBuhn, supra,* removal, or an injunction to effectuate the district Court's decision.

III.

THE DECISION OF THE COURTS OF APPEAL IS ERRONEOUS.

"In order that a judgment may constitute a bar to another suit is [] must be determined on the merits. If the first suit was dismissed for [] want of jurisdiction, or was otherwise disposed of on any grounds which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." *Costello v. United States,* 365 U.S. 265, 286 (1961) (citation omitted). *See also Angel v. Burlington,* 330 U.S. 183, 194 (1947); Reed J. dissenting; *id.* at 203 n.8, Rutledge J. dissenting.

The state trial court found that the instant § 1983 theories were barred under New Jersey's entire controversy doctrine because they were omitted from the prior action. The appellate court review of the entire federal record led it to *de novo* find that these same theories were in fact asserted in the federal action. It, nevertheless, concluded that the theories were precluded by respondents' Rule 12(b)(6) motion even though their substantive merits were not reached. However, having engaged in such unexpected fact-findings, the appellate court failed to discuss petitioner's arguments as set forth above including the question of the number of claims or transactions at issue. The New Jersey Supreme Court erred in its summary denial of petitioner's petition for certification and reconsideration leaving these critical arguments unresolved.

The appellate court clearly erred in its conclusion that the instant § 1983-suspension theories were precluded by *res judicata.* While the district court engaged in an extensive analysis

in dismissing the § 1983-harassment theories, as well as other federal theories, it is devoid of any such other application of law to the facts relevant to the instant § 1983 theories. And, a judgment dismissing a previous suit with prejudice [though there was none], unaccompanied by findings, does not bind the parties on any issue which might arise in connection with another cause of action." *Lawlor, supra*, at 327.

"For the purpose of *res judicata* the significance of what the court says it decides is controlled by the issues that were open for decision." *Angel, supra*, at 187. While a judgment may be preclusive without directly passing on the substantive merits of asserted theories, there is no indication in the record that the district court specifically adjudicated to refuse or decline to reach the ultimate substantive issues of the 1983-suspension theories open for decision because of any threshold obstacle, jurisdictional, statutory or otherwise. *Id.* at 190. The appellate court's reliance on *Velasquez v. Franz*, 589 A.2d 143 (N.J. Sup. Ct. 1991), is thus inapposite.

Further, the appellate court cited no judicial decisions having any bearing on its erroneous conclusion that the theories were properly disposed of. For "[t]here must be a right adjudicated in the first suit in order to constitute a bar and this must be shown affirmatively." *Haldeman v. United States*, 91 U.S. 584, 585 (1875). *See also New Rock, supra*, at 121. Neither the state courts nor respondents met this burden. *Cf. Wright, Miller & Cooper, supra* § 4405 at 327 nn. 16,18.

IV.

THE QUESTIONS PRESENTED ARE IMPORTANT.

The state's appellate courts had not properly applied and unduly extended controlling principles of *res judicata* in the

context of supplemental jurisdiction under 28 U.S.C. § 1367 which negative consequences are beyond that of this case. The legal posture of the case presents an occasion to also resolve the changing definitions of what constitute a cause of action for *res judicata* purposes as well as the jurisdictional limitations imposed on a district court court's under Article III of the Constitution as applied to 28 U.S.C. § 1367(a) and in particular in a multiple claim context upon which the federal courts are in disagreement.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION FILED NOVEMBER 20, 1996

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-140-95T1

GABRIEL RUBINSTEIN,

Plaintiff-Appellant,

v.

RAMAPO COLLEGE OF NEW JERSEY, EDWARD SAIFF, ROBERT A. SCOTT, JAMES KELLETT, ROBERT HATALA, and EDWARD J. CODY,

Defendants-Respondents.

Submitted November 6, 1996 – Decided NOV 20 1996

Before Judges Pressler, Stern and Humphreys.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County.

Balk, Oxfeld, Mandell and Cohen, attorneys for appellant (Arnold Shep Cohen, of counsel and on the brief).

Appendix A

Peter Verniero, Attorney General, attorney for respondents (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Kathy Stroh Mendoza, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Gabriel Rubinstein is a tenured Assistant Professor of Chemistry and Environmental Science on sick leave from his employment at Ramapo College's School of Theoretical and Applied Sciences. He attributes his present neuropsychiatric disability, for which he has received a workers' compensation award, as well as other alleged injuries to the alleged actionable wrongs committed against him by the college and five of its administrators from 1986 to 1990. He seeks redress by way of a complaint and amended complaint asserting a variety of causes of action against the college and administrators. The Law Division dismissed all the counts of the complaint by way of three separate orders, entered, respectively, on June 9, 1994, February 9, 1995, and May 5, 1995. Plaintiff appeals from each of these orders as well as from the court's subsequent order denying his motion to amend the complaint to assert a new cause of action. We affirm all four orders.

The order of June 9, 1994, dismissed plaintiff's claims for intentional infliction of emotional distress; his civil rights claims under 42 *U.S.C.A.* § 1983; his discrimination claims under the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1, *et seq.*; his claims for tortious interference with economic advantage; and his claims for personal injuries resulting from defendants' alleged acts of harassment, retaliation, and infliction of emotional distress. The order of February 9, 1995, dismissed

plaintiff's fraud and misrepresentation claims. The order of May 5, 1995, dismissed the last remaining claims asserted in the pleading, namely defamation claims.

Except as noted hereafter, we affirm substantially for the reasons orally stated by the motion judge in explaining his grounds for each of the three dismissal orders. *See also R.* 2:11-3(e)(1)(E). We are also persuaded that to the extent the dismissal of a particular cause of action was predicated on factual rather than legal insufficiency, the motion judge correctly applied the *prima-facie* case standard of *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520 (1995).

We do, however, disagree with the judge's reasoning in two respects. First, the judge dismissed the federal civil rights claims on entire controversy grounds. We are, however, satisfied that while those claims were correctly held to be precluded, the appropriate preclusionary doctrine was not entire controversy but *res judicata.* These are the facts. In January 1992, plaintiff filed an action against, among others, the college and these five individual defendants in the United States District Court for the District of New Jersey. The complaint asserted federal civil rights claims as well as many of the state claims pleaded in this action. The complaint was dismissed in August 1992 following a detailed written analysis by Judge Lechner, whose letter opinion concluded, as to the federal claims, that plaintiff had failed to state a claim upon which relief can be granted. *See Fed. R. Civ. Proc.* 12(b)(6), whose state analogue is *R.* 4:6-2(e). The judge then declined to exercise pendent jurisdiction over the state claims, dismissing them without prejudice. Plaintiff did not appeal the federal dismissal. Instead, he instituted this action in the Law Division, asserting not only the state claims but the federal claims as well. Our review of the record satisfies us that

the factual and legal bases of the federal claims asserted in this action are the same as those relied on in the prior federal action. The motion judge in this action held that the federal dismissal barred the relitigation of those claims in the state court. We agree.

The doctrine of *res judicata* bars relitigation of claims between parties that have already been litigated between them resulting in a final judgment on the merits. *See generally Watkins v. Resorts Intern. Hotel & Casino,* 124 *N.J.* 398, 412 (1991). As the Court pointed out in *Velasquez v. Franz,* 123 *N.J.* 498, 506 (1991), preclusive litigation of the merits may encompass "judgments that do not pass directly on the substance of a claim." In *Velasquez,* the Court adopted the Restatement rule, *Restatement (Second) of Judgments* § 27 comment d (1982), holding that a dismissal under *Fed. R. Civ. Proc.* 12(b)(6) "is an adjudication on the merits for *res judicata* purposes, unless the judge specifies that it is 'without prejudice.' " 123 *N.J.* at 507-509. There was no such specification here. The allegations supporting the federal claims in the state court are essentially the same as those rejected as legally insufficient in the federal court. *Velasquez* requires application of *res judicata* to bar reassertion of those claims in this litigation.

We further point out that the essence of New Jersey's unique entire controversy doctrine as applied to multi-forum litigation is to bar successive litigation of claims in one forum that were not but could have been raised in a prior action in another forum. *See generally Mortgageling Corp. v. Commonwealth Land Title,* 142 *N.J.* 336, 338 (1995). *See also Blazer Corp. v. N.J. Sports & Exposition Auth.,* 199 *N.J. Super.* 107, 112 (App. Div. 1985). The entire controversy doctrine is inapposite here because the federal claims were not omitted from the federal action. They were raised and disposed of in the federal action.

We have one further caveat in respect of the motion judge's reasoning here. With respect to plaintiff's fraud and misrepresentation claims, the judge concluded, based on the record before him, that plaintiff had failed to show that any of the defendants charged with those wrongs had made any representation of past or present fact upon which plaintiff had relied to his detriment. We agree with that evaluation for the reason stated by the trial judge and accordingly are satisfied that those claims were properly dismissed under the summary-judgment standard of *Brill, supra.* We, therefore, do not reach the trial judge's alternative ground of dismissal, namely that those individual defendants had immunity under the Tort Claims Act, *N.J.S.A.* 59:1-1, *et seq.*, except to note that ordinarily individuals employed by public entities are not accorded immunity by the Act for the consequences of their intentional wrongs. *See Chatman v. Hall,* 128 *N.J.* 394, 402 (1992).

Finally, we are entirely satisfied that the motion judge did not mistakenly exercise his discretion in denying plaintiff's motion to amend his complaint to add a cause of action under the LAD based on asserted handicap discrimination. The complaint was sought to be so amended after the dismissal of all the pleaded counts. We appreciate that the court's discretion to permit amendment of the pleading should be liberally exercised. *See, e.g., G & W, Inc. v. East Rutherford Bor.,* 280 *N.J. Super.* 507, 516-517 (App. Div. 1995); *Van Natta Mech. Corp. v. Di Staulo,* 277 *N.J. Super.* 175, 187 (App. Div. 1994); *City Check Cashing v. Nat. St. Bk.,* 244 *N.J. Super.* 304, 308-309 (App. Div.), *certif. denied,* 122 *N.J.* 389 (1990). *But see Fox v. Mercedes-Benz Credit Corp.,* 281 *N.J. Super.* 476, 483-484 (App. Div. 1995). Nevertheless, absent extraordinary circumstances, a motion to amend to add a new cause of action after the case is over is ordinarily too late. *See Grimes v. City of East Orange,* 285 *N.J. Super.* 154, 167 (App. Div. 1995).

Appendix A

The orders appealed from dismissing the complaint, denying reconsideration and denying the motion to amend the complaint are affirmed.

APPENDIX B — TRANSCRIPT OF DECISION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DATED OCTOBER 30, 1995

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
BERGEN COUNTY, DOCKET NO. BER-L-10959-92

GABRIEL RUBINSTEIN,

Plaintiff,

vs.

RAMAPO COLLEGE OF NEW JERSEY, EDWARD SAIFF, ROBERT A. SCOTT, JAMES KELLETT, ROBERT HATALA and EDWARD J. CODY,

Defendants.

TRANSCRIPT OF DECISION

Place: Bergen County Justice Center
10 Main Street
Hackensack, NJ 07601

Date: October 30, 1995

BEFORE:

HON. JAMES T. MURPHY, J.S.C.

TRANSCRIPT ORDERED BY:

ARNOLD S. COHEN, ESQ. (Balk, Oxfeld, Mandell & Cohen)

(No Appearances.)

Appendix B

Patricia A. Meade, Transcriber
36 Cranmer Road
Bayville, N.J. 08721

Video Recorded

(Proceedings commenced at 2:30 p.m.)

THE COURT: This is the matter of Gabriel Rubinstein, plaintiff, versus Ramapo College of New Jersey, et al., docket number L-10959-92.

One: Plaintiff moves for an order "settling the record on the July 14, 1995 order." The proposed form of order submitted by movant reads, ". . . that the record be settled to reflect that the notice of motion for reconsideration which the Court found on June 14th, 1995 to be filed on May 28th, 1995 was actually filed in a timely manner on May 15th, 1995."

Two: Arthur N. Martin, Jr., attorney for plaintiff, certifies, A, the motion papers were filed May 15th, 1995 and returned to him by the clerk's office for failure to pay the fee. The motion was refiled May 23rd, 1995.

Three: The following papers are attached to movant's papers: A, a copy of a notice of motion for reconsideration bearing a stamp that reads, "Superior Court, Bergen County, filed May 28, 1995, Conrad J. Roncati, Deputy Clerk." Another stamp reads, "May 23, 1995"; B, a copy of a notice of motion for reconsideration hearing a stamp that reads, "Superior Court, Bergen County, filed May 15, 1995, Conrad J. Roncati, Deputy Clerk."

Appendix B

Four: Opposition asserts, A, "Defendants/respondents oppose such a revision of the facts. I first learned of any such motion from Your Honor's law clerk on Tuesday, July 11, 1995. As of July 12, 1995 neither of my clients nor I had been served with papers for any such motion"; B, "The document I have is stamped 'filed May 23, 1995' which is out of time."

Five: Based on the papers and documents submitted for purposes of this motion I find, A, the record should be amended to set forth that the county clerk stamped the notice of motion for reconsideration as filed as early as May 15, 1995 and as late as May 28, 1995. Had this Court been previously advised of the May 15, 1995 stamping, the Court would have considered that as the filing date. Even though the required fee had not been paid, that would not have affected any requirements as to service. B, accordingly, the motion is granted to reflect that the county clerk's office stamped the motion as filed both on May 15th — strike that, as early as May 15th, 1995 and as late as May 28th, 1995. B (sic), it should be noted that on July 14th, 1995 defendant asserted "as of July 12th, 1995 it had not been served on defendants or defendant's attorney." In addition this Court finds that the motion for reconsideration fails to demonstrate relevant matters or decisions which this Court overlooked or as to which it may have erred. This Court gave full consideration to all claims, contentions, and arguments of the plaintiff; accordingly, the motion for a reconsideration is denied. C, although as stated above that this Court would have considered May 15, 1995 as the filing date, that would not have been dispositive of the motion and the motion for reconsideration would still have been denied for the other reasons stated. D, accordingly, the motion is granted to simply reflect that the clerk's office stamped the motion filed as early as May 15th, 1995 and as late as May 28th, 1995. Had this Court been aware

of the different dates, it would have considered May 15th, 1995 as the filing date, but the motion for reconsideration still would have been denied for other reasons expressed in the oral opinion.

(Proceedings adjourned at 2:37 p.m.)

CERTIFICATION

I, Patricia A. Meade, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number 40-95, index number from 14:30:52 to 14:37:56, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

s/ Patricia A. Meade
Patricia A. Meade, AOC #284

Date: 12/28/95

APPENDIX C — LETTER-OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED AUGUST 18, 1992

UNITED STATES DISTRICT COURT
District of New Jersey

Chambers Of
ALFRED J. LECHNER, JR.
Judge

U.S. Post Office and Courthouse
Newark, N.J. 07101

18 August 1992

NOT FOR PUBLICATION

LETTER-OPINION
ORIGINAL FILED WITH THE CLERK OF THE COURT

Arthur N. Martin, Jr., Esq.
The East Park House
38 East Park Street
Newark, New Jersey 07102

Glenn R. Jones, Esq.
Deputy Attorney General
Attorney General's Office
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

Re: *Gabriel Rubinstein v. Board of Trustees of Ramapo College of New Jersey, the State of New Jersey, Edward Saiff, Robert A. Scott, Teodoro Halpern, James Kellett, Robert Hatala and Edward J. Cody*
Civil Action No. 92-19

Appendix C

Counsel:

Plaintiff Gabriel Rubinstein ("Rubinstein") brought this action against the Board of Trustees of Ramapo College of New Jersey (the "Board of Trustees"); the State of New Jersey (the "New Jersey"); Robert A. Scott ("Scott"), President of Ramapo College; Edward Saiff ("Saiff"), Director of the School of Theoretical and Applied Science of Ramapo College; Teodoro Halpern ("Halpern"), Professor of Physics of Ramapo College; James Kellett ("Kellett"), Director of Personnel and Labor Relations of Ramapo College; Robert Hatala ("Hatala"), Vice President of Academic Affairs of Ramapo College; and Edward J. Cody ("Cody"), Vice President of Operation, Planning and Finance of Ramapo College (collectively the "Defendants"), individually and in their official capacities for alleged violations of the Civil Rights Act of 1987,[1] 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988, and for violation of several New Jersey State Statutes. *See* Amended Complaint (the "Amended Complaint").[2] Jurisdiction is alleged pursuant to 28 U.S.C. §§ 1331 and 1343(1)-(4) and supplemental (pendant) jurisdiction is alleged pursuant to 28 U.S.C. § 1367.

Currently before the court is the motion of the Defendants to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6).[3] This motion is decided without oral argument pursuant

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1. Rubinstein withdrew the claim brought under section 42 U.S.C. § 1981. Rubinstein also withdrew his claim brought under the Whistle Blower Act, N.J.S.A. 34:19-1, *et seq.*

2. The complaint was filed on 6 January 1992. Rubinstein filed the Amended Complaint on 13 February 1992.

3. The following has been submitted in support of this motion: the Letter Brief in Support of Motion To Dismiss (the "Moving Brief"); the (Cont'd)

to Fed. R. Civ. P. 78.[4] For the reasons set forth below, the motion of Defendants to dismiss the Amended Complaint is granted.

Facts

Rubinstein resides in Spring Valley, New York. Amended Complaint at 1. Rubinstein alleges he was a tenured professor of chemistry and environmental science in the School of

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(Cont'd)
Affidavit of Beatrice Demas (the "Demas Aff."); the Affidavit of Charlotte Bernstein (the "Bernstein Aff."); the Exhibits of Defendants (the "Def. Ex.").

The following has been submitted in opposition to this motion: the Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss (the "Opp. Brief") and the Affidavit of Gabriel Rubinstein (the "Rubinstein Aff.").

When making a determination under Fed. R. Civ. P. 12(b)(6), however, the court cannot consider matters outside the pleadings or the record of the case. *Rose v. Bartle*, 871 F.2d 331, 339-40 and n.3 (3d Cir. 1989); 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 (1990). Affidavits in support or in opposition to a motion to dismiss "clearly comprise matter outside the pleading which, if not excluded by the court, required the court to convert the pending motions to dismiss into motions for summary judgment." *Rose*, 871 F.2d at 339. Accordingly, the Affidavits of Demas, Bernstein and Rubinstein will not be considered in deciding the motion to dismiss.

4. Defendants' counsel, Glenn R. Jones, Esq. ("Jones"), requested oral argument in the notice of motion. Jones waived this request on 18 June 1992. On the same day, Rubinstein's counsel, Arthur N. Martin, Esq., also waived oral argument. Accordingly, this motion will be decided pursuant to Fed. R. Civ. P. 78.

Theoretical and Applied Science at Ramapo College. *Id.* at 3. Rubinstein was allegedly tenured in this position in 1979. *Id.* Rubinstein alleges he was also a member of the Council of New Jersey State College Local, NJSFT-AFT, AFL-CIO (the "Union"). *Id.* The Union had a collective bargaining agreement (the "Collective Bargaining Agreement") with the State of New Jersey. *Id.* at 4. The Collective Bargaining Agreement defined the salaries, benefits and other employment related rights of the Union's members. *Id.*

Rubinstein alleges that in November of 1985, he complained to Saiff, Kellett and Scott about the poor working habits of the secretaries who work in the School of Theoretical and Applied Science. *Id.* After Rubinstein complained to Saiff, Kellett and Scott, Doreen DeJohn ("DeJohn"), one of the secretaries Rubinstein had complained about, "reported to . . . Saiff and Kellett false allegations" of Rubinstein's sexual harassment of her. *Id.* Rubinstein alleges Kellett, Saiff and Halpern in turn wrongfully perpetuated and published DeJohn's allegations. *Id.*

As a result of the publication, Rubinstein alleges his employment opportunities, good name, reputation and integrity have been injured. *Id.* He further avers that he has suffered emotional trauma, distress and depression for which he has had to seek treatment. *Id.* He also had to request sick leave because of his depression and emotional trauma.[5] *Id.*

After he requested sick leave, Rubinstein alleges the Defendants engaged in a course of conduct which was intended

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5. In his Amended Complaint, Rubinstein fails to provide any specific dates for the events which allegedly took place. Accordingly, it is not known what date he took sick leave.

to force him to resign from his position and to give up his tenure, benefits and other property rights. *Id.* at 4-5. To evidence this course of conduct Rubinstein avers that the Defendants published false statements which questioned Rubinstein's sanity and fitness as a professor. *Id.* at 5.

In January 1990, Saiff allegedly agreed to permit Rubinstein to return to his teaching assignments. *Id.* at 6. Upon his arrival back to Ramapo College, Hatala refused to permit Rubinstein to teach unless he had a psychological examination. *Id.* Hatala allegedly made statements that Rubinstein acted in a mentally irrational manner. *Id.* Halpern apparently made statements "to the effect that [Rubinstein] was no longer fit to perform as a professor, was potentially violent, distorted reality and was a 'time bomb waiting to go off.' " *Id.* at 5.

Rubinstein alleges this conduct continued when he returned to work in March 1990. *Id.* at 7. He alleges he suffered major depression in July 1990 and was unable to return to work until September 1990. *Id.* Rubinstein alleges that in June 1990 he stopped receiving his salary. *Id.*

Rubinstein further alleges he has been treated in a disparate and discriminatory fashion because of his gender. *Id.* Rubinstein alleges the Scott, Cody, Kellett and the Board of Trustees reneged on their promise to provided him with the opportunity to "clear his name in connection" with DeJohn's allegations of sexual harassment. *Id.* The failure to provide a hearing is alleged to constitute gender discrimination. *Id.* at 5.

Rubinstein further alleges the Defendants' conduct was retaliatory. *Id.* He specifically maintains the Defendants were retaliating against him because he complained about the poor

work habits of certain secretaries, refused to store "hazardous chemical" in his laboratory and complained about the unsafe conditions in certain laboratories at Ramapo College. *Id.* at 6.

Rubinstein alleges the Defendants engaged in this course of conduct with the intent to inflict severe emotional distress upon him. *Id.* The Defendants allegedly knew Rubinstein was "peculiarly susceptible to emotional distress," because he suffers from a "mental illness." *Id.* His "mental illness" is allegedly a "handicap."

In November 1991, the Defendants denied his application for sick leave injury benefits. *Id.* at 7. Rubinstein alleges his right to his tenure, salary and other benefits have been denied without due process and in breach of contract. *Id.* The Defendants have admitted that Rubinstein's health benefits were at one time mistakenly suspended, but that those benefits were reinstated and that Rubinstein has been reimbursed for any cost. Significantly, Rubinstein does not allege that he has been terminated, has resigned or given up his tenure.

Claims

The Defendants allegedly interfered with Rubinstein's property and liberty interests without due process in violation 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988. Amended Complaint at 7. The Defendants allegedly deprived Rubinstein of his property and liberty interests in violation 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988. Amended Complaint at 8. The Defendants also allegedly retaliated against Rubinstein for conduct protected by the First and Fourteenth Amendments of the United States Constitution in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988. Amended Complaint at 8.

Appendix C

Rubinstein alleges Ramapo College violated the New Jersey Torts Claims Act, N.J.S.A. 59:1-1, *et seq.* and the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1, *et seq.* Amended Complaint at 9. The Defendants also allegedly violated the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* Amended Complaint at 9.

New Jersey and Ramapo College allegedly breached Rubinstein's employment contract. *Id.* The Defendants also allegedly inflicted severe emotional distress upon Rubinstein, tortiously interfered with his prospective economic advantage and his contract rights, and committed fraud and misrepresentation against him. *Id.* at 8. Rubinstein also alleges that Ramapo College is responsible for the wrongful conduct of its agents and employees under the doctrine of respondeat superior. *Id.*

Discussion

The Defendants move to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b). They present several arguments for this motion and each will be addressed, accordingly.

A. *Standard of Review*

A court may dismiss a complaint for failure to state a claim where it appears beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1395 (3d Cir. 1991); *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990); *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir.

1988). In deciding such a motion under Fed. R. Civ. P. 12(b)(6), all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. *Gomez v. Toledo*, 446 U.S. 635, 636 n.3 (1980); *McArdle v. Tronetti & Reilly*, No.91-3601, 1992 U.S. App. Lexis 6974, *3 (3d Cir. 1992); *Scattergood v. Pereleman*, 945 F.2d 618, 620 (3d Cir. 1991); *Hindes v. Castle*, 937 F.2d 868,870 (3d Cir. 1991); *Markowitz*, 906 F.2d at 103. Nevertheless, legal conclusions made in the guise of factual allegations are not given the presumption of truthfulness. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Haase v. Webster*, 807 F.2d 208, 215 (D.C. Cir. 1986); *Briscoe v. La Hue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983); *Western Mining Council v. Watt*, 643 F.2d 618, 626 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

When making a determination under Fed. R. Civ. P. 12(b)(6), a court cannot consider matters outside the pleadings or the record of the case. *Rose*, 871 F.2d at 339-40 and n.3; 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 (1990). A court, however, may properly consider public documents "to which [a] plaintiff refers in the complaint." *Ballan v. Wilfred Am. Educ. Corp.*, 720 F.Supp. 241, 247 (E.D.N.Y. 1989); *see also Papasan*, 478 U.S. at 268 n.1; *Field v. Trump*, 850 F.2d 938, 949 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).[6]

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6. Attached as exhibits in the Moving Brief are the three employee claim petitions Rubinstein filed with the New Jersey Department of Labor and Industry, Division of Workers Compensation. *See* Moving Brief, Ex. 1-3. In these forms, Rubinstein identifies the dates of the alleged conduct which violated his rights under the Civil Rights Act. In these forms, Rubinstein identifies the following dates: January 1986, 25 October 1988, 27 October 1988 and March 1990 through June 1990. *Id.*

Appendix C

A court reviewing the sufficiency of the complaint has a limited role. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see also Estate of Bailey v. County of York*, 768 F.2d 503, 506 (3d Cir. 1985).

1. *42 U.S.C. § 1981*

On the first page of Rubinstein's Opposition Brief, he states: "Plaintiff's claims brought under 42 U.S.C. § 1981 . . . are hereby withdrawn and will not be addressed. . . ." Opp. Brief at 1. Despite the withdrawal of the section 1981 claim, it will be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Rubinstein's section 1981 claim is set forth in each reference to a possible Civil Rights claim. However, despite the reference to section 1981, Rubinstein fails to allege any facts that he has been discriminated against on the basis of race. Section 1981 provides in pertinent part:

> All persons . . . shall have the same right in every State . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

42 U.S.C. § 1981. Rubinstein does not mention his race in his Amended Complaint or provide any allegations that he was discriminated against on the basis of his race. Accordingly, the

claims against the Defendants for violation of 42 U.S.C. § 1981 are dismissed.

2. *42 U.S.C. § 1983*

The Defendants argue Rubinstein's claims raised under section 1983 are barred by the statute of limitations. Moving Brief at 5. Rubinstein argues that "as late as September 1990 and November 1991 the [D]efendants continue[d] to deprive him of certain rights and liberties." Opp. Brief at 19.

Statute of limitations is ordinarily an affirmative defense. However, if the essential facts appear on the face of the pleadings, a complaint can be dismissed pursuant to Rule 12(b)(6) where it is time barred. *Cito v. Bridgewater Township Police Dept.*, 892 F.2d 23, 25 (3d Cir. 1989); *Procter & Gamble Co. v. Nabisco Brands, Inc.*, 125 F.R.D. 405, 412 (D.Del. 1987); *Sabo v. Parisi*, 583 F.Supp. 1468, 1470 (E.D. Pa. 1984). To dismiss the complaint, the alleged statement of claim must demonstrate that the cause of action has not been brought within the statute of limitations. *Cito*, 892 F.2d.at 25.

The Civil Rights Act does not contain a statute of limitations. To determine limitations periods for actions under the Civil Rights Act, federal courts have adopted, pursuant to 42 U.S.C. § 1988,[7] the state statute of limitations for the most analogous

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7. Section 1988 provides in relevant part:

> *The jurisdiction in civil and criminal matters conferred on the district courts . . .* shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable

(Cont'd)

cause of action. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987).

In *Wilson v. Garcia*, 471 U.S. 261 (1985), the Supreme Court held section 1983 actions are best characterized by personal injury actions and state statutes of limitations for personal injury actions should therefore be applied to all section 1983 claims. In 1989, the Supreme Court specified that where a state has more than one personal injury statute of limitations, it is the general or residual state personal injury statute of limitations which applies to section 1983 actions. *Owens v. Okure*, 488 U.S. 235 (1989). New Jersey's residual statute of limitation is N.J.S.A. 2A:14-2.[8] *Cito*, 892 F.2d at 25. That statute requires an

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(Cont'd)

> . . .; but in all cases where they are not adapted the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, *the common law, as modified and changed by the constitution and statutes of the State* wherein the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, *shall be extended to and govern the said courts in the trial and disposition of the cause. . . .*

42 U.S.C. § 1988 (emphasis added).

8. N.J.S.A. 2A:14-2 provides as follows:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within two years next after the cause of any such action shall have accrued.

N.J.S.A. 2A:14-2.

action to be commenced within two years after the cause of action accrues. The New Jersey statute of limitations for personal injury actions, N.J.S.A. 2A:14-2, therefore, applies to the claims brought under the Civil Rights Act.

Although New Jersey law determines the applicable statute of limitations period for section 1983 claims, federal law governs the date of accrual of a section 1983 claim. *Carr v. Town of Dewey Beach*, 730 F.Supp. 591, 603 (D.Del. 1990); *see Deary v. Three Un-named Police Officers*, 746 F.2d 185, 197 n. 16 (3d Cir. 1984). A claim accrues under section 1983 when the plaintiff knows or has reason to know of the injury forming the basis of the cause of action. *See Carr*, 730 F.Supp. at 603; *see also Sandutch v. Muroski*, 684 F.2d 252, 254 (3d Cir. 1982) (per curiam).

Rubinstein's Amended Complaint does not detail the dates of the Defendants' conduct which allegedly violates section 1983. The following dates, however, are mentioned in the Amended Complaint: November 1985, the month Rubinstein complained about the "poor working habits of the secretaries," *id.* at 4; January 1990, March 1990 and September 1990, the months during which the Defendants allegedly engaged in a wrongful course of conduct, *id.* at 7; and November 1991, the month Rubinstein's health benefits were terminated. *Id.*

Rubinstein does not specify any dates between 1985 and 1990. Such information would elucidate when the two year statute of limitations accrued and whether certain claims are time barred. The essential facts necessary for determining if the statute of limitations has run fails to appear on the face of the Amended Complaint. It can not be determined from the face of the Amended Complaint if the section 1983 claims are time

barred. *See Cito*, 892 F.2d at 25; *Procter & Gamble Co.*, 125 F.R.D. at 412; *Sabo*, 583 F.Supp. at 1470. Accordingly, the section 1983 claims are not dismissed on this basis.

3. *Eleventh Amendment Immunity*

In the event any claims are not determined to be time barred, the Defendants move for dismissal on the ground that the Defendants are immune from suit under the Eleventh Amendment of the United States Constitution. Moving Brief at 4-5. Specifically the Defendants argue that Ramapo College is part of the State of New Jersey, and therefore, the Eleventh Amendment's protections should extend to the Defendants. Moving Brief at 10.

With regard to the State of New Jersey, Rubinstein concedes that "[it] is not liable to him for any violations of 42 U.S.C. § 1983." Opp. Brief at 9. However, with regard to the remaining Defendants, Rubinstein argues it is premature to dismiss the section 1983 claim on the basis of the Eleventh Amendment's immunity because discovery has not been had and therefore, it can not be determined if the Eleventh Amendment's immunity would extend to the remaining Defendants. Opp. Brief at 12.

The Eleventh Amendment of the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

Id. The Eleventh Amendment affirms the principle that "sovereign immunity limits the grant of judicial authority in Article III" of the Constitution. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, *reh. denied*, 473 U.S. 926 (1985). The Eleventh Amendment immunizes a state from suits brought by its own citizens and by citizens of another state. *Id.*; *see also Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984). The Eleventh Amendment bars suits against a state "unless the [s]tate has waived it immunity, . . . or unless Congress has exercised its undoubted power under [section] 5 of the Fourteenth Amendment to override that immunity." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989) (citations omitted). Where "the state itself is not named as a party, the suit may still be barred if the state is the real party in interest." *Rehberg v. Glassboro State College*, 745 F.Supp. 1113, 1114 (E.D.Pa. 1990) (quoting *Edelman v. Jordan* 415 U.S. 651, 663 (1974).

The Supreme Court, in *Will*, also held that a suit against a state official sued in his or her official capacity does not constitute "a suit against the official but rather [one] against the official's office." 491 U.S. at 71. In such a circumstance, the suit against the official "is no different than a suit against the State itself." *Id.* Accordingly, the Court held: "[N]either a [s]tate nor its officials acting in their official capacities are 'persons' under [section] 1983." *Id.*

Here, it has already been conceded that the State of New Jersey is immune from suit for Rubinstein's claims under 42 U.S.C. § 1983. Accordingly, the section 1983 claim against the State of New Jersey is dismissed. *See Will*, 491 U.S. at 64. However, if New Jersey remains a real party in interest in this litigation, the Eleventh Amendment's immunity may extend to

the Ramapo College and the Officials of Ramapo College. The Third Circuit, in *Urbano v. Board of Managers of New Jersey State Prison*, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970), articulated the following factors to use when determining whether an entity is part of the State of New Jersey for the purposes of Eleventh Amendment immunity. These factors are:

> (1) How state law treats the agency generally; (2) Whether the payment of the judgment will have to be made out of the state treasury; (3) Whether the entity has the funds or the power to satisfy the judgment; . . .[9] (5) Whether the entity has been separately incorporated; (6) Whether the entity exercises relative autonomy over its operations; (7) Whether the entity has the power to sue and be sued and to enter into contracts; (8) Whether the entity's property is immune form state taxation; and, (9) Whether the sovereign has immunized itself from responsibility for the agency's operations.

Id. at 251-52. The Circuit in *Fitchik* condensed and refined the *Urbano* factors to established the following criteria:

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9. The Third Circuit in *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 n. 2 (3d Cir.), *cert. denied*, 493 U.S. 850 (1989), held that the fourth *Urbano* factor, which involved whether the governmental agency was partaking in a proprietary function, is not a valid factor to consider in light of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1985). In *Garcia*, the proprietary-governmental function was rejected as a basis for determining if states must comply with federal legislation enacted under the commerce clause. *Id.*

> (1) Whether the money that would pay the judgment would come from the state . . . [*Urbano* factors 2,3 and 9]; (2) The status of the agency under state law . . . [*Urbano* factors 1,5,7 and 8]; and, (3) What degree of autonomy the agency has [*Urbano* factor 9].

873 F.2d at 659; *accord Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 816 (3d Cir. 1991), *cert. denied*, __ U.S. __ 112 S.Ct. 2281 (1992). In *Bolden*, the Circuit reiterated that "the 'most important' factor [in the application of the immunity provided by the Eleventh Amendment] is 'whether any judgment would be paid from the state treasury.' " *Id.* at 818 (quoting *Fitchik*, 873 F.2d at 659).

In this case, there are insufficient facts to determine whether the factors set forth by the Third Circuit, particularly whether a judgment would be satisfied from the state treasury, are satisfied for the purposes of extending Eleventh Amendment Immunity to the remaining Defendants. Accordingly, it is premature to determine if the Eleventh Amendment will support the dismissal of Rubinstein's section 1983 claims against the remaining Defendants.

2. *Failure to State a Section 1983 Claim*

The Defendants also argue the section 1983 claims must be dismissed under Rule 12(b)(6) because Rubinstein fails to state claims upon which relief can be granted. *Id.* at 4, 10-12. They first argue Rubinstein fails to state claims because his allegations do not implicate liberty or property interests actionable under section 1983. *Id.* They further argue Rubinstein was not discriminated on the basis of his gender. *Id.* at 11-12. The College

does not provide any person a formal hearing to contest the sexual harassment allegations unless a formal complaint is filed against that person. *Id.* No formal complaint for sexual harassment was filed against Rubinstein.

Contrarily, Rubinstein argues he states claims under section 1983. Opp. Brief at 9. In his acknowledgment that, "[a]lthough the action against the State of New Jersey may not be maintained under section 1983," he nonetheless contends that "[he] may however maintain his 1983 claims against the remaining [D]efendants." *Id.*

To state a claim under section 1983,[10] a plaintiff must show the violation of a right secured by the Constitution and laws of the United States and must demonstrate that the conduct complained of was committed by a person acting "under color of state law." *West v. Atkins*, 487 U.S. 42, 48-49 (1988); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Shaw v. Strackhouse*, 920 F.2d 1135, 1142 (3d Cir. 1990); *McArdle v.*

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10. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1983.

Tronetti, 769 F.Supp. 188, 190 (W.D.Pa. 1991), *aff'd*, 961 F.2d 1083 (3d Cir. 1992); *Borsello v. Leach*, 737 F.Supp. 25, 26 (E.D.Pa. 1990). "The ultimate issue in determining whether a person is subject to suit under § 1983 . . . is [whether] the alleged infringement of federal rights [is] 'fairly attributable to the State.' " *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)); *see also Jackson v. Temple Univ. of Commonwealth System of Higher Educ.*, 721 F.2d 931, 933 (3d Cir. 1983).

In this case, the first prong of the test has been satisfied; it is not disputed that the conduct was maintained by state actors. However, Rubinstein must demonstrate that the alleged conduct deprived him of rights protected by the Constitution.

a. *Liberty Interests Under First Amendment*

First, he argues the Defendants retaliated against him for exercising his First Amendment Right of freedom of speech. *Id.* at 15. The alleged retaliation damaged his reputation, and as a result, deprived him of his property interest in his employment. *Id.* at 16.

In order for Rubinstein to set forth a claim for retaliation in violation of his First Amendment, he must show that (1) he was engaged in a protected activity and (2) that the protected activity was a substantial or motivating factor in the decision or action taken against him. *Trotman v. Board of Trustees of Lincoln University*, 635 F.2d 216 (3d Cir. 1980), *cert. denied*, 451 U.S. 986 (1981); *Fuchilla v. Prockop*, 682 F.Supp. 247, 263-63 (D.N.J. 1987). If these factors are satisfied, the burden shifts to the defendant, who can defeat the plaintiff's assertions by "demonstrating that the same action would have been taken even

in the absence of the protected conduct." *Trotman*, 635 F.2d at 224. The *Trotman* court noted: "To put it another way, the employee can prevail only if the court finds that but for the protected activity, the employee would not have been removed." *Id.* at 225.

Here, it is not disputed that Rubinstein has the right to criticize the work product of the secretaries of Ramapo College and complain about the safety science laboratories; such conduct is protected activity. However, there are no factual allegations to support the conclusion that the Defendants terminated Rubinstein's employment in retaliation for his statements and thereby deprived him of his property interest. In fact, his Amended Complaint demonstrates the opposite. He remains a tenured professor of Ramapo College and he still receives his employment benefits. Rubinstein fails to demonstrate that as a consequence of his exercise of his First Amendment rights that he has been deprived of his protected property interest in his employment. Accordingly, he fails to state a claim under section 1983 against the remaining Defendants based upon this theory.

b. *Due Process Under The Fourteenth Amendment*

He further argues he stated a section 1983 claim for violation of the Due Process Clause of the Fourteenth Amendment. He argues the Defendants failed to provide him a hearing which would vindicate the damage effected upon his reputation as a result of the allegations of sexual harassment. *Id.* at 18.

"[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent [the] government 'from abusing [its] power, or employing it as an instrument of oppression.' " *Deshaney v. Winnebago County Dept. Social Services*, 489 U.S.

189, 196 (1989) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)). The Supreme Court in *Collins v. City of Harker Heights*, __ U.S. __, 112 S.Ct. 1061 (1992), reaffirming its interpretation of the Due Process Clause, stated:

> "The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself [from] depriv[ing] individuals of life, liberty, or property without 'due process of law,' but this language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . ."

__ U.S. at __, 112 S.Ct. at 1069 (quoting *Deshaney*, 489 U.S. at 195). The Due Process Clause guarantees a fair procedure in connection with a deprivation of life, liberty, or property by a State. *Collins*, __U.S. at __, 112 S.Ct. at 1068. To state a claim under the Due Process Clause, there must be a deprivation of a life, liberty or property interest.

A person's reputation does not rise to the level of a constitutionally protected property or liberty interest. *See Scheetz v. Morning Call, Inc.*, 946 F.2d 202, 206 (3d Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1171 (1992). As the Supreme Court in *Paul v. Davis*, 424 U.S. 693 (1976), *rehg. denied*, 425 U.S. 985 (1976), stated: "[D]efamatory publications, however serious they may have harmed [a plaintiff's] reputation, d[o] not deprive [a plaintiff] of any 'liberty' or 'property' interest protected by the Due Process Clause [of the Fourteenth Amendment]." 424 U.S. at 712; *see also San Filippo v. Bongiovanni*, 961 F.2d 1125,

1134 (3d Cir. 1992); *Lahaza v. Azeff*, 790 F.Supp. 88, 92 (E.D.Pa. 1992). The Third Circuit has stated: "[M]ere damage to reputation, apart from the impairment of some additional interest previously recognized under state law, is not cognizable under the [D]ue [P]rocess [C]lause." *Sturm v. Clark*, 835 F.2d 1009, 1012 (1987) (citing *Paul*, 424 U.S. at 698); *see also Pelullo v. Patterson*, 788 F.Supp. 234, 239 (D.N.J. 1992).

The Circuit, in *Sturm*, further stated: "Most, if not all, charges of defamation are inevitably accompanied by financial loss. . . . [H]owever, . . . financial harm resulting from government defamation alone is insufficient to transform a reputation interest into a liberty interest." *Id.* at 1013; *see also Pelullo*, 788 F.Supp. at 239. Defamation is actionable under 42 U.S.C. § 1983 where "it occurs in the course of or is accompanied by a change or extinguishment of a right or status guaranteed by state law or the Constitution." *Clark v. Township of Falls*, 890 F.2d 611, 619 (3d Cir. 1989); *accord Lahaza*, 790 F.Supp. at 92-93. In order for injury to one's reputation to be actionable, the plaintiff must, therefore, demonstrate that an additional protected interest beyond his reputation has been damaged by the conduct. *San Filippo*, 961 F.2d at 1134; *Lahaza*, 790 F.Supp. at 92.

Rubinstein alleges that his reputation has been damaged as a result of the defamatory conduct of the Defendants. He alleges, as a consequence of this conduct, that he has been deprived of his ability to work. A tenured faculty position at an educational institution is a property interest and "[i]t follows . . . that [such an] interest . . . cannot be deprived . . . without due process." *San Filippo*, 961 F.2d at 1134 (citations omitted). In this case, however, Rubinstein has not alleged that he has been deprived of his employment. He remains a tenured professor of Ramapo

College despite the fact that he has allegedly been defamed. His property interest in his occupation has not been altered or extinguished. As a result, the injury to his reputation is actionable only under state defamation law. *See Sturm*, 835 F.2d at 1012 (citing *Paul*, 424 U.S. at 711-12).

Accordingly, Rubinstein fails to state a section 1983 claim against the remaining Defendants upon this basis.

c. *Gender Discrimination*

Rubinstein argues he has also set forth a claim under section 1983 based upon gender discrimination. Opp. Brief at 16-17. He argues he was treated differently than DeJohn, because he was not afforded the opportunity at a hearing to "have [his] stor[y] told . . ." *Id.* He contends he was denied such an opportunity because of his gender. *Id.*

To state a claim under 42 U.S.C. § 1983 for discrimination, a plaintiff must prove the existence of purposeful discrimination. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990) (citing *Batson v. Kentucky*, 476 U.S. 79, 93 (1986)). It must be demonstrated that the plaintiff received "different treatment from that received by other individuals similarly situated." *Kuhar v. Greensburg-Salem School Dist.*, 616 F.2d 676, 677 n.1 (3d Cir. 1980); *Andrews*, 895 F.2d at 1478. To demonstrate gender discrimination, a plaintiff must show that the disparate treatment was because of his gender. *Id.*

Here, Rubinstein contends that he and DeJohn are similarly situated parties. DeJohn is the woman who accused Rubinstein of sexual harassment but who did not file a formal complaint against him. The Defendants point out that DeJohn was not

afforded a formal hearing by Ramapo College because she did not file a formal complaint against Rubinstein. Nonetheless, Rubinstein contends that he has been discriminated on the basis of his gender because DeJohn would have been afforded a hearing to address her allegations had she filed a formal complaint. He argues he should have been afforded a hearing to address the allegations in order to clear his reputation. Because no hearing was held by Ramapo College, Rubinstein contends that he has been discriminated on the basis of gender.

Despite this contention, Rubinstein fails to compare himself to a woman similarly situated. DeJohn, the comparison, is not similarly situated. She is not a woman accused of sexual harassment against whom formal complaints were not filed but to whom hearings were afforded in order to clear her reputation. Consequently, Rubinstein fails to set forth the first element of a claim for gender discrimination; he has not demonstrated that women similarly situated to him are treated differently than he. Accordingly, Rubinstein fails to state a claim against the remaining Defendants for gender discrimination.

3. *Respondeat Superior Liability*

Rubinstein argues that the Board of Trustees should be liable under a theory of respondeat superior. Amended Complaint at 9. Local governmental units may not he held liable for the tortious conduct of its employees under a respondeat superior liability theory. *Canton v. Harris*, 489 U.S. 378, 388 (1989); *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978); *see also Collins*, __ U.S. __, 112 S.Ct. at 1066; *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1059 (3d Cir. 1991); *Fuchilla* 682 F.Supp. at 261. Accordingly, Rubinstein fails to state a claim under section 1983 against the Board of Trustees on this basis.

However, under the standards articulated in *Monell*, a local government unit may be held liable under section 1983, "when in the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible." *Monell*, 436 U.S. at 694.

The standard for a governmental units liability under section 1983 as discussed in *Canton* also requires a showing of "deliberate indifference." *Canton* 489 U.S. at 388. The "deliberate indifference" standard is consistent with the Supreme Court's admonition that governmental units "can be liable under [section] 1983 only where its policies are the 'moving force [behind] the constitutional violation.' " *Canton*, 489 U.S. at 389 (citations omitted). Only where there is deliberate indifference can the defect be attributed to a governmental unit's policy or custom. *Id.*

A "high degree of fault [must be shown] on the part of [government] officials before an omission that is not in itself unconstitutional can support liability as [government] policy under *Monell*." *Id.* at 396 (O'Connor, J., concurring). Accordingly, "[proof of a single incident of unconstitutional activity is not sufficient to impose liability. . . ." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985). "To adopt lesser standards of fault and causation would open [governmental units] to unprecedented liability under § 1983." *Canton*, 489 U.S. at 391.[11]

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11. The Supreme Court cautioned against an overzealous approach to imposing municipality liability:

> In virtually every instance where a person has had his or her constitutional rights violated by a city

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A plaintiff must meet two burdens before the "deliberate indifference" standard is applied to his or her section 1983 claim. A plaintiff has the burden of showing that an (1) official policy or custom (2) "caused a constitutional tort."[12] *Monell*, 436 U.S. at 691. To meet the first element of the section 1983 claim, that the government unity "*itself* causes the constitutional violation at issue," a plaintiff must present evidence showing a governmental policy or custom existed which caused the alleged constitutional deprivation. *Canton*, 489 U.S. at 385 (citing *Monell*, 436 U.S. at 694-95 (emphasis in original)).

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> employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities — a result we rejected in *Monell*, 436 U.S., at 693-694. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism.

Canton, 489 U.S. at 392 (citations omitted).

12. By requiring a plaintiff to show a municipal policy or custom caused the alleged constitutional injury, section 1983 prevents a municipality from being "held liable *solely* because it employs a tortfeasor — or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis in original).

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A government "[p]olicy is made when a 'decisionmaker possess[ing] final authority to establish [government] policy with respect to the action' issues an official proclamation, policy or edict." *Id.* (citing *Andrews* 895 F.2d at 1480). A government custom, "on the other hand, can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." *Id.*; *see also Andrews*, 895 F.2d at 1480; *Fletcher v. O'Donnell*, 867 F.2d 791, 793-94 (3d Cir), *cert. denied*, 492 U.S. 919 (1989). Depending upon the alleged claim, plaintiff must demonstrate that a particular policymaker is responsible for creating the policy or acquiescing to the custom. *Andrews*, 895 F.2d at 1480.

However, "proof of the mere existence of an unlawful policy or custom is not enough to maintain a [section] 1983 action. A plaintiff bears the additional burden of proving" the government policy or custom proximately caused the injuries. *Bielevicz v. Dubinon*, 915 F.2d 850 (3d Cir. 1990). To establish proximate cause, plaintiff must show an "affirmative link" or "plausible nexus" between, respectively, the policy or custom alleged and the injury to the constitutional rights. *Id.*, at 850-851; *see Tuttle*, 471 U.S. at 823; *Estate of Bailey*, 768 F.2d at 507.

Upon meeting these burdens, the alleged constitutional violation will support section 1983 municipality liability only where the action of the relevant policymaker "amounts to *deliberate indifference* to the rights of [plaintiff]." *Canton*, 489 U.S. at 388 (emphasis added); *see also Csik v. Smith*, No. 87-5135, 1990 U.S. Dist. LEXIS 16023, *7 (D.N.J. 26 October 1990) (applying *Canton* factors for holding municipality liable under section 1983 for failure to train or supervise police officers).

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In this case, it has been previously been determined that Rubinstein has not stated any claims under section 1983 for constitutional torts arising from the conduct of the Defendants. He, therefore, fails to meet the second requirement set forth in *Monell*. Consequently, Rubinstein fails to state a claim under section 1983 against the Board of Trustee of Ramapo College for the alleged acts of its employees because Rubinstein has not suffered a constitutional tort or deprivation.

Accordingly, the claims Rubinstein raises in the Amended Complaint against the Defendants under 42 U.S.C. § 1983 are dismissed.

C. *Claims Under Sections 1985, 1986 and 1988*

1. *Section 1985*

Section 1985[13] was enacted to provide a cause of action for individuals deprived of their federal rights by conspiracies. *Rogin*

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13. Section 1985 provides:

> **§ 1985. Conspiracy to interfere with civil rights**
>
> *Preventing officer from performing duties*
>
> (1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place where his duties as an officer are required to be performed, or to injure him in his person or property on account

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of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand of petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of

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v. Bensalem Township., 616 F.2d 680, 696 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981). The provisions of the statute encompass private conspiracies as well as actions under color of state law. *See Griffin v. Breckenridge*, 403 U.S. 88 (1971).

In order to state a claim under section 1985, the plaintiff

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> depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against one or more of the conspirators.
>
> 42 U.S.C. § 1985.

must allege: a conspiracy, motivated by a discriminatorily based animus, for the purpose of depriving any person or class of the equal protection of the law and an act in furtherance of the conspiracy, whereby a person is injured. *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 828-29 (1983); *Hobson v. Wilson*, 737 F.2d 1, 14 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *see also Burt v. Ferrese*, 871 F.2d 14, 17 (3d Cir. 1989); *Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 425 (3d Cir. 1988).

The requirement that the conspiracy be motivated by class-based animus was added by the Supreme Court in *Griffin*. 403 U.S. at 102. The Court held that in order to give "full effect" to the congressional purpose of section 1985, "there must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.* Accordingly, section 1985 "does not apply to all conspiratorial tortious interference with the rights of others, but only to those motivated by some class-based, invidiously discriminatory animus." *Hobson*, 737 F.2d at 14; *see also Burt*, 871 F.2d at 17; *Robison*, 848 F.2d at 425.

There are insufficient factual allegations by Rubinstein to support a claim of gender-based, invidiously discriminatory animus against men. He has not alleged instances of invidiously discriminatorily gender-based motivated conduct by the Defendants. Accordingly, Rubinstein fails to establish a policy of gender-based invidiously discriminatory motive to which municipality liability or supervisory liability would attach. Similarly, Rubinstein alleges no facts to establish that the Defendants had a class-based discriminatory motive directed

toward Rubinstein. Consequently, Rubinstein fails to state a claim against the Defendants pursuant to 42 U.S.C. § 1985.

Accordingly, Rubinstein's claims against the Defendants under 42 U.S.C. § 1985 are dismissed.

2. *42 U.S.C. §§ 1986 and 1988*

Neither section 1986 nor section 1988 creates independent causes of action. *Black v. Bayer*, 672 F.2d 309, 312-13 n. 4 (3d Cir. 1982) (quoting *Bartee v. Yanoff*, 514 F.Supp. 96, 97 n.2 (E.D.Pa. 1981)), *cert. denied sub. nom.*, 459 U.S. 916 (1982). Claims under section 1986[14] are derived from section 1985

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14. Section 1986 provides:

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there

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claims so that "plaintiff's § 1986 claim would fail with his § 1985 claim," if he has not stated a claim under section 1985. *Id.* Because Rubinstein fails to state a claim against the Defendants under section 1985, his section 1986 claim also fails. *See Black*, 672 F.2d at 312-13 n.4.

Section 1988[15] is a "procedural provision and also creates

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> be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. § 1986.

15. Section 1988 provides:

> **§ 1988. Proceedings in vindication of civil rights; attorney's fees**
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of the Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted t the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and

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no remedies in addition to those available under substantive provisions of the Civil Rights Act." *Id.* Section 1988 merely authorizes a court to award attorney's fees to a prevailing party in a civil rights action brought pursuant to sections 1981, 1982, 1983, 1985 or 1986. *See* 42 U. S. C. § 1988. Because Rubinstein fails to state a claim under section 1981, section 1983 or section 1985, Rubinstein's section 1988 claims are dismissed against the Defendants.

Accordingly, Rubinstein's claims in the Amended Complaint against the Defendants under 42 U.S.C. § 1988 are dismissed.

D. *State Law Claims*

Rubinstein alleged supplemental jurisdiction over any state law claims pursuant to 28 U.S.C. § 1367 and asserted federal

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(Cont'd)

> statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988.

jurisdiction over the Defendants pursuant to 28 U.S.C. § 1343 for various alleged violations of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988.

Supplemental jurisdiction enables federal courts to hear state law claims over which there is no independent basis of jurisdiction. 28 U.S.C. § 1367; *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988). Supplemental jurisdiction depends upon the existence of subject matter jurisdiction over other claims in the action. Pursuant to 28 U.S.C. § 1367, the "district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. . . ." 28 U.S.C. § 1367(a); *see also Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991).

Section 1367(c) permits a court to decline to exercise supplemental jurisdiction when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3); *see also Carnegie-Mellon*, 484 U.S. at 350 ("when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.") (footnote omitted); *Fuentes v. South Hills Cardiology*, 946 F.2d 196, 198 n.3 (3d Cir. 1991) (dismissal of "pendant state law claim[]" proper where federal claims dismissed for lack of subject matter jurisdiction).

As discussed, the claims raised against the Defendants pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988 have been dismissed. Because no other ground for supplemental jurisdiction is alleged, supplemental jurisdiction will no longer be exercised in this case. *United Mine Workers v. Gibbs*, 383

U.S. 715, 725 (1966); 28 U.S.C. § 1367(c)(3). The state law claims as set forth in the Amended Complaint are dismissed.[16]

Conclusion

For the reasons set forth above, the Amended Complaint is dismissed. An order accompanies this opinion.

s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR., U.S.D.J.

AJL: bmw
cc: Philip Selecky, Deputy Clerk

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16. Defendants also seek dismissal of the state law claims on the ground that Rubenstein fails to state claims upon which relief can be granted. Moving Brief at 13-18. Because supplemental jurisdiction does not exist, it is inappropriate to decide these claims.

APPENDIX D — DENIAL OF PETITION FOR CERTIFICATION OF THE SUPREME COURT OF NEW JERSEY FILED APRIL 24, 1997

SUPREME COURT OF NEW JERSEY
C-884 September Term 1996
43,354

GABRIEL RUBINSTEIN

Plaintiff-Petitioner,

v.

RAMAPO COLLEGE OF NEW JERSEY, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-140-95 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of April, 1997.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX E — DENIAL OF MOTION FOR RECONSIDERATION OF THE SUPREME COURT OF NEW JERSEY FILED JUNE 30, 1997

SUPREME COURT OF NEW JERSEY
September Term, 1996
M-1514/1515
43,354

GABRIEL RUBINSTEIN

Plaintiff-Movant,

v.

RAMAPO COLLEGE OF NEW JERSEY, et al.,

Defendants-Respondents.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for an extension of time within which to file a motion for reconsideration (M-1514) is granted; and it is further

ORDERED that the motion for reconsideration (M-1515) is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 30th day of June, 1997.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

(7)

Supreme Court, U.S.
FILED
OCT 29 1997
CLERK

No. 97-566

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GABRIEL RUBINSTEIN,

Petitioner,

v.

RAMAPO COLLEGE OF NEW JERSEY, EDWARD SAIFF, ROBERT A. SCOTT, JAMES KELLETT, ROBERT HATALA, AND EDWARD J. CODY.

Respondents.

On Petition for a Writ of Certiorari To The Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

Petitioner Gabriel Rubinstein ("Dr. Rubinstein"), a tenured Assistant Professor of Chemistry and Environmental Science on sick leave from his employment at Ramapo College's School of Theoretical and Applied Science, a State institution, seeks review of a decision by the Superior Court of New Jersey Appellate Division affirming dismissal of his Complaint for damages for his present neuropsychiatric disability, as well as other alleged injuries which he attributes to alleged wrongs committed against him by the College and five of its administrators from 1986 to 1990 (Petition for Certiorari, Appendix A, (hereinafter App.__)).

In January 1986, a secretary at Ramapo College made it known to the Director of Personnel that she objected to certain unwelcome notes and other attention from petitioner and wanted them stopped. The secretary never filed a formal complaint with the College against Dr. Rubinstein for sexual harassment and consequently the College took no action against him (Pa49, Pa52, Pa88).[1]

Instead, on December 7, 1988, Dr. Rubinstein filed a grievance with the College's Affirmative Action Office against the secretary, his Department supervisor and another faculty member alleging discrimination in treatment of promotion, harassment, retaliation for protesting employment practices and defamation of character based on disability (Pa40). The Affirmative Action Office eventually informed petitioner that the

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[1] Pa refers to the briefs and appendix filed by Petitioner Rubinstein in the Appellate Division.
Da refers to the briefs and appendix filed by the State, et al. in the Appellate Division.

incidents he had listed in his grievance "[did] not fall under the aegis of Affirmative Action." (Pa86).[2]

Dr. Rubinstein took sick leave the winter of 1988, returned to the College in April 1989, taught the remainder of the Spring 1989 semester, and absented himself the Fall 1989 semester. With the Spring 1990 semester scheduled to begin January 31, 1990, on January 19, 1990 he requested more sick leave beginning January 22, 1990 (Pa90-92). Then, January 21, 1990, in a meeting with the Vice President of Academic Affairs, he retracted his request for sick leave. Given the College's concern regarding his reliability, on January 23, 1990, he was ordered to submit to a medical/psychological examination (2T13).[3] On February 2, 1990, he was cleared to return to work and he returned to teach for about a three-month period (2T15). He stopped teaching after a summer 1990 laboratory class.

On September 10, 1990, Dr. Rubinstein applied for sick leave injury benefits pursuant to his union's Collective Bargaining Agreement with the College. This request was denied and no appeal was ever taken pursuant to N.J.S.A. 18A:6-26 and N.J.A.C. 9:2-6.2 et seq. (Pa94). In October 1990, Dr. Rubinstein took a leave of absence and has not returned to the College to teach in over seven years.

In November 1990, he filed three Claim Petitions with the New Jersey Department of Labor and Industry, Division of Worker's Compensation against the College. Claim No. 90-052435 claimed neuropsychiatric and other injury arising from events occurring on January 1986 from alleged "harassment and

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[2] Petitioner seeks to divide his 42 U.S.C. §1983 claim in two. Supposedly, events to this point in the chronology would become the "harassment" claim, and events that follow become the "suspension" claim.

[3] 2T refers to transcript of February 9, 1995 hearing before the Superior Court of New Jersey, Law Division motion judge.

false accusations." Claim No. 90-052431 claimed "further mental harassment" including allegations of mental instability. Claim No. 90-052423 claimed continued harassment and "whispering campaigns" which aggravated and exacerbated his psychiatric disabilities to the point where he allegedly became "totally disabled." (Da53-55). Dr. Rubinstein began receiving temporary disability worker's compensation from the State on February 16, 1991 and is collecting to this day.

On January 6, 1992, Dr. Rubinstein filed an action against, among others, the College and six individual defendants (including five of the present individual defendants) in the U.S. District Court for the District of New Jersey. Dr. Rubinstein filed the amended Complaint on February 13, 1992. (App. C at 12a fn. 2). The complaint asserted violations of 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988, and violation of several New Jersey statutes (App. C at 14a). Dr. Rubinstein alleged that after he complained about poor working habits of the secretaries, one secretary complained of sexual harassment by him to the Director of Personnel. As a result of publication of this allegation to the college community, he alleged he was injured in his employment opportunities, good name, reputation and integrity. He alleged he had suffered emotional trauma, distress and depression resulting in his request for sick leave. When he sought to return to work, he was required to submit to a psychological examination (Pa92).

The federal claims were dismissed on August 18, 1992 by the Honorable Alfred J. Lechner, Jr., U.S.D.J. who granted the State's motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief could be granted (App. C at 44a-45a). Because no other grounds for supplemental jurisdiction was alleged, the state law claims were dismissed without prejudice (App. C at 43a-45a).

Dr. Rubinstein did not appeal the District Court decision. Instead, on September 19, 1992, he instituted this state court

action alleging violations of 42 U.S.C. §1983, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. and various common law claims. On January 4, 1993, he filed an Amended Complaint that identified the same time period, the same incidents, the same respondents and the same cause of action as the federal action. The motion judge, in three separate orders, dismissed with prejudice all counts of the Amended Complaint, finding that the federal claims asserted in the state court action were barred by application of the entire controversy doctrine (1T22)[4] because they "derived from a single transaction or related series of transactions" (1T23).

On June 20, 1994, Dr. Rubinstein brought a Motion for Reconsideration. The motion was denied (Pa384). On May 15, 1995 he brought a Motion for Reconsideration to Vacate the Orders of February 9 and May 5, 1995 and on July 7, 1995 sought leave to amend his Amended Complaint to assert a new cause of action (Pa392). On July 14, 1995, these motions were denied (Pa392, Pa413).

Petitioner appealed each of these four Orders. On November 20, 1996, the Appellate Division issued an unpublished decision affirming the trial court's orders (App. A).

In its decision, the Appellate Division agreed with the motion judge's dismissal of the federal civil rights claims, including the 42 U.S.C. §1983 claim, differing only as to the appropriate preclusionary doctrine not the result. The Appellate Division held that the appropriate preclusionary doctrine was res judicata, not entire controversy, because the federal claims were not omitted from the federal action but were raised and disposed of in the federal action (App. A at 4a).

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[4] 1T refers to transcript of decision of June 9, 1994 of the motion judge.

Notice of Petition for Certification, filed December 5, 1996 with the Supreme Court of New Jersey, was denied on April 24, 1997. (App. D). A Motion for Reconsideration was denied on June 30, 1997. (App. E).

Dr. Rubinstein has been a tenured Assistant Professor of Chemistry and Environmental Science at Ramapo College since 1979 and continues to hold this position. No detenure action has been ever been instituted against Dr. Rubinstein at Ramapo College, nor has he ever been the subject of disciplinary action. However, he has chosen not to teach since October 1990.

SUMMARY OF THE ARGUMENT

Review by the Supreme Court of the United States is not warranted as application by the Superior Court of New Jersey, Appellate Division of res judicata as preclusionary doctrine is consistent with this Court's decisions. Since petitioner raised and had adjudicated his 42 U.S.C. §1983 claims in Federal District Court and failed to appeal the District Court's granting of the Fed. R. Civ. Proc. 12(b)(6) motion to the United States Court of Appeals for the Third Circuit, the New Jersey State courts properly ruled that he was barred from relitigating his §1983 claims in a second state court action.

ARGUMENT

THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE ALL ASPECTS OF THE 42 U.S.C. §1983 CLAIM WERE ADJUDICATED IN THE UNITED STATES DISTRICT COURT AND THE STATE COURTS PROPERLY BARRED RELITIGATING THIS CLAIM IN A SECOND ACTION.

Petitioner untimely and incorrectly seeks to divide his 42 U.S.C. §1983 claim in two - as a "harassment" claim and a "suspension" claim - to then argue that there was no final judgment in the District Court as to the "suspension" claim so as

to preclude relitigation of this claim in state court. This counters the single-strand analysis that led to the District Court judgment on the merits and the New Jersey Appellate Division's application of res judicata to bar relitigation of the identical claim. Because the State courts applied this preclusionary doctrine to this matter consistent with the teachings of this Court, there is simply no basis for further review by the Court.

Both petitioner's State Court Amended Complaint and his earlier federal complaint alleged a series of related events that all stem from an alleged sexual harassment of a Ramapo College secretary by Dr. Rubinstein. His 42 U.S.C. §1983 claims in both actions comprise the alleged harassment, his reactions to the allegation including his on-again off-again attendance record, respondent Ramapo College's requirement that he be examined by an independent doctor to determine his capacity to return to work, and his ultimate self-imposed withdrawal from his teaching responsibilities.

In its letter opinion dated August 18, 1992, the District Court addressed all aspects of the 42 U.S.C. §1983 claim, holding that Dr. Rubinstein had failed to state a claim upon which relief could be granted. Looking to Dr. Rubinstein's asserted rights under the First Amendment, the District Court found protected the right to criticize the work product of the secretaries of Ramapo College and complain about the safety of the science laboratories. However, the Court concluded that Dr. Rubinstein had failed to demonstrate that, as a consequence of his exercise of his First Amendment rights, he had been deprived of his protected property interest in his employment.

Next, the District Court addressed the Due Process claim. Dr. Rubinstein alleged that his reputation had been damaged as a result of the defamatory conduct of the College and that as a consequence of this conduct, he asserted that he had been deprived of his ability to work. The Court found that because Rubinstein's property interest in his occupation had not been

altered or extinguished, any injury to his reputation was actionable only under state defamation law. Paul v. Davis, 424 U.S. 693, 711-12 (1976), reh'g. denied, 425 U.S. 985 (1976)(App. C at 31a-32a).

In his Petition for Certiorari, Dr. Rubinstein seeks to define some deprivation of property interest. He claims that he was

> suspended from teaching in January 1990 without any notice, hearings, pay, or probable cause, [in retaliation for his] ongoing seeking redress since December 1989 of his previously filed grievances with the College's Affirmative Action Office's written policy and procedures, alleging, inter alia, defamatory handicap discrimination.
>
> [Petition for Certiorari at 6].

The District Court emphasis on the fact that Dr. Rubinstein remains a tenured professor at the College underlies its judgment on the merits of the entire §1983 claim. Petitioner may not avoid his earlier judgment on the merits by merely concocting a purportedly new legal theory. Doe v. Allied-Signal, Inc., 985 F.2d 908, 913, (7th Cir. 1993). The fact is, however, there was no suspension or other loss of job. He was simply asked to undergo a medical exam as a condition of his employment..

The only viable issue, therefore, is whether the court below appropriately applied the preclusionary res judicata doctrine to bar reassertion of the 42 U.S.C. §1983 claim in subsequent state court action.

The trial court dismissed "all federal claims based on the U.S. Constitution and/or 42 U.S.C. §1983" as having been decided by the District Court decision. In so doing, it invoked the entire controversy doctrine, finding that the claims "derive from a single transaction or related series of transactions" and to the extent that any particular allegation was not previously set forth in the District Court, these allegations had been

"unfavorably withheld" and "all constitute related components. Blanchard v. Beech Concrete, 150 N.J. Super. 277, [375 A.2d 675] (App. Div. 1977)" (1T22-23).

The Appellate Division affirmed substantially for the reasons orally stated by the motion judge. While agreeing with the motion judge that the federal claims were precluded, it found inapposite the application of New Jersey's unique entire controversy doctrine because the federal claims had not been omitted from the federal suit but were in fact raised and disposed of in the federal action. (App. A at 3a, 4a). The Appellate Division held that "the appropriate preclusionary doctrine was not entire controversy but rather res judicata." In so ruling, the Appellate Division applied the New Jersey Supreme Court's ruling in Velasquez v. Franz, 123 N.J. 498, 506, 589 A.2d 143, 147 (1991). There, as the Appellate Division found, the Supreme Court acknowledged,

> the preclusive litigation of the merits may encompass judgments that do not pass directly on the substance of a claim. In Velasquez, the Court adopted the Restatement (Second) of Judgments §27, comment d (1982), holding that a dismissal under Fed. R. Civ. Proc. 12(b)(6) is an adjudication on the merits for res judicata purposes, unless the judge specifies that it is 'without prejudice' 123 N.J. at 507, 509. There was no such specification here. The allegations supporting the federal claims in the state court are essentially the same as those rejected as legally insufficient in the federal court. Velasquez requires application of res judicata to bar reassertion of those claims in this litigation. [App. A, at 4a].

The holding in Velasquez is consistent with decisions of this Court. Federal law determines the effects under rules of res judicata or claim preclusion of a judgment in Federal Court. Heck v. Humphrey, 512 U.S. 477, 498, fn. 9 (1994). Under res

judicata, a final judgment on the merits of the action precludes the parties or their privities from litigating issues that were or could have been raised in that action on the same cause of action. Federated Department Stores, Inc., v. Moitie, 452 U.S. 394, 398 (1981).

> The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits. See Angel v. Bullington, 330 U.S. 183, 190, 67 S. Ct. 657, 661, 91 L.Ed. 832 (1947, Bell v. Hood, 327 U.S. 678, 55 S.Ct. 773, 90 L.Ed. 939 (1946). [Moitie, 452 U.S. at 399, fn.3.]

In the Petition for Certiorari, Dr. Rubinstein introduces his dual-claim theory to overturn the state court decision. However, contrary to petitioner's claim for certiorari, neither the federal nor the State Court Amended Complaint separated the §1983 claims into distinct causes of action. From the beginning, petitioner never made "clear separations and discontinuities," Wright, Miller & Cooper, Federal Practice, §4409 at 73 (1996 Supp.) so as to signal separate causes of action. His 42 U.S.C. §1983 claims in both actions stretch from the alleged sexual harassment of a secretary to his withdrawal from teaching in 1990.

Petitioner cites with approval Commissioner of Internal Revenue Service v. Sunnen, 333 U.S. 591 (1948). That tax case involving income taxes in different years is clearly distinguishable. However, respondents agree with its understanding of the meaning and scope of res judicata:

> The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit

> and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. (citation omitted). The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.
>
> [333 U.S. at 597].

The Appellate Division decision properly applied the principle of res judicata to petitioner's 42 U.S.C. §1983 claim in a manner consistent with prior United States Supreme Court decisions. For that reason, further review by this Court is unwarranted.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
NOV 17 1997
CLERK

No. 97-566

In The

Supreme Court of the United States

October Term, 1997

GABRIEL RUBINSTEIN,

Petitioner,

vs.

RAMAPO COLLEGE OF NEW JERSEY, EDWARD SAIFF, ROBERT A. SCOTT, JAMES KELLETT, ROBERT HATALA, and EDWARD CODY,

Respondents.

On Petition for a Writ of Certiorari to the New Jersey Superior Court, Appellate Division

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RESTATEMENT OF THE CASE

In November 1985 a departmental memo to faculty detailed improvements in secretaries' work habits as suggested by petitioner. On January 8, 1986, based solely on ex-parte communications initiated by the Personnel Director with one of the secretaries, he concluded in a covert report to her that petitioner had committed sexual harassment. Petitioner was disciplined by him, both verbally and in writing, to cease and desist — contrary to respondents' claims. (Res. 1, 5). Petitioner was later formally informed that the secretary could file her dormant charge from 1985 at the college till 1991. The Affirmative Action Office, rather than Personnel, addresses all such allegations and its written time limitation was two weeks.

In April 1988, when petitioner returned from his first sick leave, faculty intervention led to the Personnel's Director's futile attempt to retrieve the report from the college officials. At that meeting they denied his statement to them concluding that sexual harassment has occurred.

Upon legal intervention, the Vice-President of Operation, Planning and Finance finally convened a postponed hearing on October 27,1989 only to be unexpectedly terminated as soon as it began despite petitioner's protests. Petitioner rejected the Vice President's conclusion of no probable cause, dated January 5, 1990, since it was issued only to him and without any findings, an investigation or a hearing. The President refused to issue a full retraction of the 1986 report.

In late October 1988 the secretary and a faculty member alleged to others at the college that petitioner was mentally unfit to teach there. On December 7, 1988 petitioner filed grievances against his accusers with the Affirmative Action Office based on the President's verbal and written recommendation of December 2 and 12, 1988.

On December 21,1989 petitioner sought redress of his formal grievances from the Affirmative Action Office. It was summarily rejected for lack of jurisdiction after an ex-parte investigation rather than a mandated meeting of the parties. On January 11, 1990 petitioner appealed to the President.

On Monday, January 22, 1990, petitioner returned to work from his sick leave as approved by the Director of his department on January 19, 1990. He was then unexpectedly ordered (compare Res. 2 and 7) by the Vice-President for Academic Affairs not to teach that day and until a psychological evaluation was concluded; no notice or any hearing were given at any time. The five, not one (Res. 2), weeks evaluation found no reason for the suspension and petitioner was not paid his salary. On January 23, 1990, the petitioner was notified that he could take legal action since the President would not have the college address his grievances, no reasons were given. Except for the January 19, 1990 matter, the dates cited by respondents are incorrect. (Res. 2, para. 1).

In August 1990 the Vice-President for Academic Affairs formally approved petitioner's sick leave request for the fall semester unilaterally continued by respondents in January 1991. Contrary to respondents' claims, (Res. 2), all of petitioner's leaves were either approved or authorized by the Vice-President. In November 1990 petitioner filed three separate Workers' Compensations' claims after the President denied his August Sick Leave Injury application in October 1990. Respondents' restatement and omissions of material facts is reprehensible and misleading to this Court.

Petitioner limits his counter statement of historical facts as they relate to the question of the number of claims or occurrences in the actions below.

REPLY TO RESPONDENTS' ARGUMENTS

Respondents' argument that *res judicata* is a bar to petitioner's instant theories for relief under 42 U.S.C. § 1983 because they had been adjudicated by the District Court represents a change in position from that taken below and contrary to the New Jersey Appellate Division's finding that they were not. (App. A at 4a), (Res. at 5, 8).

The District Court's decision was not final for *res judicata* purposes since it was not responsive to all the relevant issues nor did it represent the completion of all the steps in the adjudicative process.

The District Court did not adjudicate the instant § 1983 theories since it did not apply existing law to the facts. *Cf., Dist. of Col. Court of Appeals v. Feldman*, 460 U.S. 462, 477, 479 (1983). Both respondents and the Appellate Division failed to demonstrate that the theories were disposed of "on the basis of a dispositive issue of law." (Res. 6-7, 8); *Nietzke v. Williams*, 409 U.S. 319, 326 (1989). Thus, since the substantive merits of the instant § 1983 theories were not adjudicated, and since respondents did not incur the inconvenience of preparing to meet them, their reassertion in the state action is not precluded by *res judicata*. *C.f., Costello v. United States*, 365 U.S. 265, 286 (1961); *See also* 27A, *Federal Procedure*, L. Ed., *Pleadings and Motions*, § 62:608 at 355; 46 Am. Jur., Judgments, § 607 at 880. "It is not the form of a ruling, nor how it was induced, but the substance that lays the cornerstone of *res judicata*." *Id.* § 583 at 860. Since the District Court did not grant respondents' motion to dismiss the entire case with prejudice, its decision is potentially subject only to issue rather than claim preclusion, and petitioner did not reassert the explicitly decided § 1983 theories in the state action. *C.f. Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 327 (1954); no relitigation occurred of the instant § 1983 theories. *Compare*, (Res. at 6).

Further, *res judicata* is inapplicable to a claim which, as here,

is independent of that previously and partially adjudicated, *i.e.*, the suspension and harassment claims. Contrary to respondents' contention, (Res. 5, 7), the multiple claim argument was presented by petitioner below but respondents instead acquiesced to the Appellate Court's *de novo* analysis which erred in ignoring the argument. Respondents' reliance on the cause of action test, (Res. at 9), is "unnecessary grudging" for it is the claim or the factually-based transaction standard which is used by the federal courts in the context of *res judicata*. *Cf.*, *Nevada v. United States*, 483 U.S. 110, 130 N. 12 (1983).

Respondents' argument that only one claim is at issue cannot be sustained by its undifferentiated chronology which arbitrarily tied together two distinct factual basis as one. (Res. 3, 6, 9). The historical factual grouping noted above constitute conveniently separate administrative or judicial proceedings or trial units based on different claims, transactions or occurrences. The sexual harassment matter, and related harassment claim, arose from the Personnel Director's conduct in 1986. The controversy was to be resolved via a hearing by the Vice President for Operation, Planning and Finance. It explicitly excluded all facts related to petitioner's filed grievances in 1988 alleging, *inter alia*, a defamatory handicap discrimination charge. In January 1990 petitioner was involuntarily suspended by the Vice-President of Academic Affairs based solely on the circumstances surrounding petitioner's attempt to return to work from his sick leave which suspension required a hearing by the Board of Trustees. N.J.S.A. 18A:6-18.1,-20.

As in this typical retaliation claim, embodied in the suspension claim or transaction, petitioner filed grievances based on one set of facts and wrong causing respondents to unexpectedly suspend him for seeking their redress, precipitating a second harm on a different and distinct set of facts and controversy. *See* Wright, Miller & Cooper, *Federal Practice*, § 4409 at 81 and n.22.

Thus, whether the suspension claim itself constitutes separate

transactions, it is clear that respondents' acts in 1986 regarding the sexual harassment matter did not cause the 1990 suspension. Contrary to respondent's contention, several, not one, intervening and distinct acts and events cause separated harms to petitioner. "A new claim or cause of action is created as the conduct continues." *Id.* at 77. Notably, the Appellate Division characterized petitioner's state handicap discrimination theory as a new cause of action, (App. A. at 5a), even though the proposed amended complaint added no new facts.

> Under the circumstances, whether [respondents'] conduct be regarded as a series of individual [constitutional] torts or as one continuing tort, the [ ] [prior decision] does not constitute a bar to the instant suit.

Lawlor, supra, at 328.

Since there has been no final judgment on the merits of the instant § 1983 theories of relief and since they relate to an independent claim or transaction from that adjudicated by the District Court, they are not barred by *res judicata.*

Respectfully submitted,

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